COURT OF APPEAL.

S. Thillaimuthu for the appellants.

Ong Huck Lim for the respondents.

Cur. Adv. Vult.

Mathew C.J. : — The respondents entered into a contract with the appellants for the delivery c.i.f. at Penang of 100,000 roofing tiles and 2,000 ridges. The description was BYMH brand First Class Roofing Tiles and Ridges (Feroke Size). The evidence showed clearly that Feroke Size, though not a trade term, was understood by the parties to mean a particular size.

The tiles and ridges when delivered were neither BYMH brand nor the size contracted for. The tiles and ridges were off-loaded into lighters; part of the shipment was taken to Pematang Pau and the remainder were carried onwards to Alor Star for delivery to a sub-purchaser from the respondents.

The only point in this appeal which requires consideration is whether the respondents accepted the consignment. In my view, their dealing with the consignment constituted an acceptance. The letter of 17th April, 1953 from the respondents to the second appellant did no more than suggest a settlement. In my view, on the authority of *Hardy & Company v. Hillerns & Fowler*[1], the respondents had already accepted the consignment, when the letter of 9th June, 1953 was written by the respondents' solicitors. The respondents had lost their right to reject and were confined to their remedy in damages.

The question of damages should be referred to the Registrar for assessment after due enquiry, the measure of damages being the difference between the value of the consignment actually received and the value which the consignment would have had had it been delivered in accordance with the contract description.

The appellants have only succeeded in part in this appeal, and I would therefore award no costs in the appeal. The deposit should be paid to the appellants if the costs in the lower Court have been paid.

Murray-Aynsley C.J. (S.) (with whom **Hill J.** agreed) : — This litigation arose out of a sale c.i.f. of some Indian tiles. It was a sale by description BYMH Brand 1st class roofing tiles and ridges (Feroke size).

It appeared from the evidence that the expression "Feroke size" was not a usual trade description. It does, however, appear that this term does in certain circles bear a particular size and it was understood by the parties to the contract to bear a particular size. The goods shipped by the appellants did not correspond with the description; they were not BYHM brand and they were not of the required size. The respondents in the circumstances were entitled to reject the goods delivered.

When the goods arrived the respondents wrote a grumbling letter on April 7th. It is contended that this letter constituted an acceptance. I do not think it did (cf. a similar sort of letter in *Varley v. Whipp*[2]). It certainly did not constitute a rejection.

Meanwhile the goods were taken from the ship in a lighter. Some were landed in Butterworth, the rest were taken in the same lighter to Alor Star where they arrived early in May, for delivery to a sub-purchaser from the respondents. In my opinion this dealing with the goods constituted an acceptance. (*Hardy & Co. v. Hillerns & Fowler*[1]). Therefore a letter which was sent on June 9th by the respondents' solicitors cannot operate as a rejection. In this respect I differ from the learned trial Judge. The respondents are entitled to damages.

I agree with the order proposed by the President both as regards the damages and as to costs.

Order accordingly.

Solicitors: *Conaghan, Wreford & Thornton; Ong Huck Lim & Co.*

K. S. ABDUL KADER v. M. K. MOHAMED ISMAIL

[C. A. (Mathew C.J., Murray-Aynsley C.J.(S), and Spenser Wilkinson J.) October 8, 1954]

[K.L. — F.M. Civil Appeal No. 46 of 1954]

Arbitration — Agreement that arbitrators should give award after considering written statements of parties and supporting statements — Award based on part of answers to questions put to one party — Procedure adopted by arbitrators disapproved.

This was an appeal against an order that an arbitration award be adopted and enforced. The point in this appeal was whether the award was a valid one. It was agreed between the parties to the arbitration that the arbitrators should give the award after considering the written statements of the parties and supporting documents and that no evidence was to be called. When the award was delivered, it appeared that the arbitrators, before making it, questioned the appellant on certain of the matters which were in dispute, and clearly based their decision on part of the answers given by him.

Held: (1) the arbitrators were influenced in arriving at their decision on the issue in question by what they were told by the appellant; (2) the Court ought to show disapproval of the procedure adopted by the arbitrators.

Cases referred to :—

(1) *W. Ramsden & Co. Ltd. v. Jacobs* (1922) 1 K.B. 640.

(2) *Mercer v. Reid* 47 T.L.R. p. 574 on appeal 48 T.L.R. p. 33.

(3) *Grand Trunk Railway Co. of Canada v. The King* (1923) A.C. 150.

COURT OF APPEAL.

Morris Edgar for the appellant.

Ng Ek Teong for the respondent.

Cur. Adv. Vult.

Mathew C.J. (with whom **Murray-Aynsley C.J. (S.)** and **Spenser Wilkinson J.** agreed): — This is an appeal against an order that an arbitration award be adopted and enforced. The only point in this appeal is whether the award was a valid one.

It was agreed between the parties to the arbitration that the arbitrators should give the award after considering the written statements of the parties and supporting documents. No evidence was to be called. When the award was delivered, it appeared that the arbitrators, before making it, questioned the first defendant (appellant) on certain of the matters which were in dispute, and clearly based their decision on part of the answers given by him.

Mr. Edgar for the appellant has submitted that this action on the part of the arbitrators (which is disclosed in the award itself) amounted to legal misconduct and thus rendered the award bad on the face of it. He relied on the case of *W. Ramsden & Co. Ltd. v. Jacobs*[1]. The head-note reads:—

"In an arbitration between sellers and buyer arising out of the rejection by the latter of certain goods which he alleged did not correspond to the contract description, the arbitrators heard the evidence of each of the parties in the absence of the other. No objection was made at the time to this procedure. An award having been made in favour of the sellers, the buyer moved to set it aside:—

Held, that the award must be set aside, as the arbitrators had acted improperly in hearing the evidence on behalf of one party in the absence of the other."

In the course of his judgment Bray J. said:—

"The difficulty I feel is whether the applicant ought now to be heard to complain, having regard to what happened. He made no protest at the time, but that, while a matter to be considered, is not conclusive. It is said on behalf of the sellers that no injustice was done, that the issues were quite plain and depended upon no question of fact on which there would be a conflict of evidence. I feel the force of that, but Mr. Goddard for the buyer has urged that we ought to show our disapproval of the procedure that was followed, and, with some reluctance, I yield to that argument and say that we ought to set the award aside."

Mr. Ek Teong for the respondent has submitted that no substantial injustice has been done, and that if there was misconduct on the part of the arbitrators, this misconduct was condoned by the appellant, and that at this late stage he is barred from complaining. He further argued that the interview of the appellant by the arbitrators was an advantage to him in that it gave him an opportunity to give an explanation which was not afforded to the other parties, and he could not now be heard to complain of misconduct, although in fact the arbitrators decided against the appellant after the interview.

He relied for these propositions on *Mercer v. Reid*[2]. The misconduct alleged in that case was that the arbitrator after a witness had given his evidence and been cross-examined was unknown to the parties questioned by him at a later stage on certain questions with regard to measurement of material. In the course of his judgment Swift J. said (at p. 574):—

" . . . if there had been any substance in the complaint, the Court would not have hesitated to set aside the award. It could not be too clearly laid down that arbitrators must so conduct proceedings as to give a fair hearing to all parties. In **Rex v. Sussex Justices, ex parte McCarthy** (1924) 1 K.B. 256, the present Lord Chief Justice had said that it was not only of fundamental importance that justice should be done, but also that it should be made clear to all the world that it was being done. Had it been shown here that there had been any impropriety on the part of the arbitrator which would justify the Court in setting aside the award? In his opinion Mr. Parke's action in interviewing Mr. Beeching did not amount to such impropriety. So far as the matter complained of had any monetary effect, that effect was merely to reduce the amount awarded to be paid by the Reid family by £90. It did not therefore lie in their mouths to make any such complaint."

An appeal against this decision was dismissed by the Court of Appeal which said (p. 33):—

"It had been agreed that the arbitrator should inspect the quarry without the parties, and there was no ground for interfering with the order of the Divisional Court. Moreover, the appellant could have objected to the alleged misconduct before the award was published, but she did not do so and took the chance of the award being in favour of the respondents to the arbitration. She could not now be heard to complain of misconduct. The appeal must be dismissed."

He also cited the case of the *Grand Trunk Railway Co. of Canada v. The King*[3], where an administrator's award was not set aside, although the chairman of the arbitration in giving his reasons for the award relied upon certain evidence which had been given in other proceedings but was not made evidence in the arbitration proceedings. In the course of his judgment, Birkenhead L.C. said (at p. 166):—

"It is plain that, if no reference had been made to Mr. Chamberlain's evidence, the majority of the arbitrators would have arrived at the same conclusion and upon the same materials. If the award were set aside and remitted to the arbitrators on the ground of the reference by the chairman to that evidence the only result would be to cause great expense and delay to all parties without any reasonable prospect that the arbitrators would arrive at a determination different from that which they have already decided."

In my view, both these cases can be distinguished from the present case. It is clear that the arbitrators were influenced in arriving at their decision on the fourth issue by what they were told by the appellant. Whether their decision would have been different if

they had not questioned the appellant it is impossible to say.

It has been urged by Mr. Ek Teong that in any event the appellant should have made his complaint on the award being delivered. It seems to me, however, that he chose the proper moment to put forward his complaint when the matter came before the Court for an order that the award be adopted and enforced. I would adopt the remarks made by Bray J. *supra* to the effect that we ought to show our disapproval of the procedure adopted by the arbitrators.

I would allow this appeal with costs, and order that the award be set aside. The deposit will be paid out to the appellant.

Appeal allowed.

Solicitors: *Bannon & Bailey; Braddell & Ramani.*

KANG YEOW HOOI & ORS. v. PUBLIC PROSECUTOR

[C. A. (Mathew C.J., Abbott & Spenser Wilkinson JJ.) October 19, 1954]

[K.L. — Criminal Reference No. 7 of 1954]

Common Gaming Houses Enactment (Cap. 47), s. 11 — Presumption under — Evidence necessary — Lottery — "then in progress" — Interpretation —Elements of distribution and chance must both be present — Offences not mala per se — Sentence.

This was an appeal by way of reference under s. 34 of the Courts Ordinance, 1948. The points specially referred were: (i) the evidence necessary to establish the fact that a lottery is a lottery within the meaning of the Common Gaming Houses Enactment (now Common Gaming Houses Ordinance, 1953); (ii) the interpretation of the phrase "then in progress" under s. 11 of the Common Gaming Houses Enactment (now s. 9 of the Common Gaming Houses Ordinance, 1953).

Counsel for the appellants argued the appeal on two points: (i) the evidence of the expert witness was insufficient to establish that a lottery was being conducted; (ii) if a lottery was being conducted, the presumption under s. 11 that the lottery was then in progress was rebutted.

Held: (1) the essence of a lottery is the distribution of money or money's worth which is determined by lot or chance. The elements of distribution and chance must both be present; (2) it was unnecessary for the Court in the present case to decide at what given moment any particular lottery is concluded, but on the facts of the case, the finding that the lottery was still in progress was correct.

On the question of sentence the Court considered that a sentence of imprisonment for offences of this kind does not necessarily provide a deterrent, and consideration should always be given to the imposition of a substantial fine with a view to avoiding the necessity of sending persons to prison who have committed offences which are not **mala per se**.

Cases referred to:—

(1) *Public Prosecutor v. Lee Ee Teong* (1953) M.L.J. 244.

(2) *Chua Chong Chut & Ors. v. Public Prosecutor* Ipoh — Mag. Cr. App. No. 133 of 1953 — unreported; noted (1954) M.L.J. XXXV.

CRIMINAL REFERENCE.

At about 9.30 p.m. on June 21, 1953, the Police raided a house in Batu Kurau, Taiping, in which they found the three appellants and another man, named Cheah Kooi Sung, each seated at a table with an abacus, slips of paper with figures on them and sums of money. There were also six note-books and nine sheets of paper, wrapped together on the table in front of the 3rd appellant. All four were arrested and charged with assisting in carrying on a 100, 1,000, and 10,000 character public lottery in contravention of section 4(i)(c) of the Common Gaming Houses Enactment (Cap. 47). At the trial an expert witness, Mr. Gee Koh Weng, Chinese Affairs Officer, Penang, gave evidence identifying the documents and note-books as all relating to a 100, 1,000, and 10,000 character lottery "based on the M.C.A. lottery which was drawn on June 21, 1953, at 2.30 p.m." The Treasurer of the local M.C.A. at Taiping proved that the lottery drawing started at 2.30 p.m. and finished at 3 p.m. The prosecution accepted that the lottery had been drawn by 3.30 p.m. at the latest.

The Magistrate accepted the evidence of the expert and held that the presumption under section 11 of the Enactment arose. He also held that the fact that the lottery had been drawn six hours before the Police raid did not rebut the presumption; and for that proposition he relied upon *Chua Chong Chut & Ors. v. Public Prosecutor*[2], an unreported judgment of Thomson J. He convicted all four accused and, in assessing the sentence, he followed another judgment of Thomson J. in Criminal Appeal No. 136 of 1953, in which the learned Judge said, "My reason for taking this course was that the present widespread and flagrant breaking of the law that is going on in connection with this type of lottery is a public scandal and that it is clear that heavy fines alone are not providing a sufficient deterrent." The Magistrate took into consideration against the 1st appellant a previous conviction under the Betting Enactment and sentenced him to 3 months rigorous imprisonment. He considered that the other three accused were "working for" the 1st appellant and sentenced the 2nd appellant to the maximum fine of $3,000 or in default 12 months rigorous imprisonment, and the 3rd appellant to a fine of $1,500 or in default 6 months rigorous imprisonment. The other accused was also fined the maximum fine of $3,000 or in default 12 months rigorous imprisonment but he did not appeal. The appeal was against both conviction and sentence.